APR 15 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

No. 867

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner and Appellant Below,

versus

MRS. IRENE BOOTH MOORE,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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IN THE

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No. .....

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioner and Appellant Below,

versus

MRS. IRENE BOOTH MOORE,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE EARL WARREN, Chief Justice of the United States, and the Associates Justice of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

There was no opinion in the United States District Court for the Western District of Louisiana from which appeal was taken.

The opinion of the United States Court of Appeals for the Fifth Circuit was dated February 2, 1956, and has been published in 229 F. 2d 1, March 19, 1956. A copy thereof is appended hereto.

II.

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered February 2, 1956.

A petition for rehearing was denied without opinion on March 2, 1956.

Jurisdiction to review the judgment herein is given by Section 1254, Title 28, United States Code.

III.

There is presented for review (a) the refusal to give a specific instruction stating petitioner's theory of the case as set forth specifically in its answer and (b) the giving of a charge which confused the duties and responsibilities of respondent's deceased husband, trainmaster, with the duties and responsibilities of the members of the crew. (c) In affirming the refusal of the specific instruction asked, the Fifth Circuit is in conflict with decisions of other Courts of Appeals and of this Court.

IV.

Jurisdiction in the court of first instance was under the Employer's Liability Act, 35 Stat. 65, Secs. 31-56, Title 45 U.S.C.

STATEMENT OF CASE AND ARGUMENT

A.

Paragraph 27 of defendant's answer set up this defense:

"Defendant alleges that the collision between the two trains referred to in the complaint was due solely to the negligence of Benjamin T. Moore, plaintiff's deceased, in failing to perform his responsibilities and duties to see that the operating rules and special rules and instructions in the movement of train Extra 51-A North were complied with. Such duties were his responsibility and only his responsibility. To perform them was the reason that Trainmaster Moore was instructed to ride this train. These duties and responsibilities could not be delegated by him to members of the crew." (Tr. p. 26)

The charge that was refused was as follows: (Tr. pp. 420-421)

"The Court charges the jury that the parties have stipulated as facts the following with reference to the trains involved in the collision:

> 'On August 10, 1951, said Moore was in the employ of defendant and was engaged in his duties as train master, riding a troop train designated as Extra 51A. In the early morning said train was travelling northerly in the direction of Alexandria and Shreveport and was in Pointe Coupee Parish, Louisiana, and at the same time, defendant's passenger train No. 1, known as Southern Belle, was travelling in the opposite direction, that is southerly toward New Roads, Baton Rouge and New Orleans. They were travelling on a single main track owned by Texas and Pacific Railroad Company and leased to defendant.

'At about 7:03 A. M. at a point about 1.59 miles north of Lettsworth, Louisiana, there was a head-on collision between said trains. A few minutes after the collision Benjamin T. Moore was found dead, lying on the ground. He was not burned. The verdict of the Coroner's jury was "That the said B. T. Moore came to his death as the result of hemorrhage and shock caused by fracture cervicle vertebrae and internal injuries of thorax caused by being on train wreck on L & A R. at Lettsworth, August 10, 1951."

'The Southern Belle Number 1 passed Simmesport, the last open office north of New Roads, Louisiana, on its schedule at 6:48 A. M. As it approached the point of the collision it was travelling at the estimated speed of 50-55 miles an hour. The rules allowed it a speed up to 55 miles an hour. It was due at Lettsworth at 7:03 A. M. and at Batchelor at 7:11 A. M.

'Troop Train, Extra 51A was inferior to Southern Belle train Number 1 and should have taken a siding at Batchelor, Louisiana, 6.9 miles south of Lettsworth in order to clear said Southern Belle No. 1, operating on schedule time. At the time of the collision approximately 8.8 miles north of Batchelor, Extra 51A was running on the main line of the time of Southern Belle No. 1.

'The collision between said trains occurred between Mansura Junction and Lobdell Junction. The operation and movement of said train and of other traffic between said Junctions were controlled by T & P - L & A Joint Time Table No. 3, effective October 1, 1950, and Uniform Code of Operating Rules, effective May 1, 1950. Either party may offer relevant provisions thereof.

'Special Rule 2 of said Joint Time Table reads in part as follows: "Inferior class trains, extras and yard engines must clear No. 1 and No. 2 at least 10 minutes."

'Special Rule 4 thereof reads as follows: "Train movements between Mansura Jct. and Lobdell Jct. will be handled by L. & A. train dispatcher and over the signature of the L. & A. Trainmaster."

'Rule S-90 of the Uniform Code reads as follows: "Action to Prevent Failure at Meeting Points.—If the engineer of a train after passing the last station approaching a meeting or waiting point, or point where his train is restricted for another train, fails to sound Signal 14 (n) or fails to prepare to stop short of the fouling point, when required, the conductor will take immediate action to stop the train."

'Fireman, Brakeman and other members of the crew will also be held responsible for failure to take immediate action to stop the train.' (See Rules 14 (n) and 16 (1).'
Rules 14 (n) and 16 (l).'

"If the jury finds from the evidence that the duties of Trainmaster Moore riding Extra 51-A were to see and require that the crew of said train complied with the operating and special rules and time table schedule which required that Extra 51-A take the siding at Batchelor, Louisiana, 8.8 miles south of the collision point, in order to clear No. 1 as the rule required; and Extra 51-A having passed that point, to require that the crew take immediate action to stop it, and if you find from the stipulations of fact and from all the other evidence that B. T. Moore failed to perform his duties, then you will bring in a verdict for defendant."

Refusal of this charge prevented the jury from having a clearcut, unencumbered view of the defense, and the decision is in conflict with those of other courts. Our contention is well summed up on *C. & N. W. Ry. Co. v.*

Green, 164 F. 2d 55, 61 (Eighth Circuit) as follows:

"We think the refusal of the Court to give the requested instruction, either in its tendered form or in a restatement of its material substance, was error. It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made. 53 Am. Jur., Trial § 626, pp. 487, 488. See also *Western Union Tel. Co. v. Morris*, 8 Cir., 105 F. 49, 54; *North Central Coal Co. v. Hughes*, 8 Cir., 224 F. 57, 59; *Ranney v. Barlow*, 112 U.S. 207, 214, 5, S. Ct. 104, 28 L. Ed. 662; *Pennock v. Dialogue*, 2 Pet 1, 15, 27 U.S. 1, 15, 7 L. Ed. 327. In fact, even a request for an instruction which is not entirely perfect may in some situations impose upon the Court the duty to give a more specific instruction on a particular issue, where it soundly appears that such an instruction is needful to enable the jury to intelligently determine the question. *Cf. E. I. Du Pont De Nemours & Co. v. Frechette*, 8 Cir., 161 F. 2d 318, 323; *Feldmann v. Connecticut Mutual Life Ins. Co.*, 8 Cir., 142 F. 2d 628, 631; *Pfotzer v. Aqua Systems*, 2 Cir., 162 F. 2d 779, 783."

C. & N. W. Ry. Co. v. Green, 164 F. 2d 55, 61

Montgomery v. Virginia Stage Lines, 191 F. 2d 770, 772 (District of Columbia Circuit)

C. R. I. & P. R. R. Co. v. Lint, 217 F. 2d 279, 285 (Eighth Circuit). Citing the *Green* and *Montgomery* and other cases, the Court said further: "The right given by rule 51 of Federal Rules of Civil Procedure to request instructions is a valuable right."

B.

In paragraph 27 of the answer, quoted above, it was set forth that Moore's duties and responsibilities "could not be delegated by him to members of the crew."

At the outset of the discussion of defendant's contention and position, the Court, R. 436, stated to the jury that Moore's duties and responsibilities "could not be delegated by him to **OTHER** members of the crew." (emphasis ours)

The Court of Appeals (pp. 7 and 8 of printed opinion) wiped this off the slate by stating that other parts of the charge cleared this up and that the jury could "hardly have been thrown into confusion" by the use of this "single technically inaccurate phrase."

We do not think a court can speculate on the impressions made on the minds of jurors or that a litigant's rights can be based on what a court thinks could "hardly" have influenced a jury.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 15,747, Louisiana & Arkansas Railway Company, Appellant, vs. Mrs. Irene Booth Moore, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this court, and for such

further relief as to this court may seem proper.

Dated at Alexandria, Louisiana, April 4, 1956.

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APPENDIX A

JUDGMENT.

Extract from the Minutes of February 2, 1956.

LOUISIANA & ARKANSAS RAILWAY COMPANY,

No. 15747. versus

MRS. IRENE BOOTH MOORE.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Louisiana & Arkansas Railway Company, and the surety on the supersedeas bond herein, Central Surety & Insurance Corporation, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * * * * * * * * * *

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15747

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Appellant,

versus

MRS. IRENE BOOTH MOORE,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(February 2, 1956.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

TUTTLE, Circuit Judge: This is a suit for wrongful death brought against the railroad under Section 1 of the Federal Employers Liability Act (45 U.S.C.A. §51) by the administratrix of the estate of one of its employees. The deceased, a trainmaster on the railroad, was killed in a head-on collision of the Southern Belle No. 1 and the

Extra 51-A which occurred at 7:03 A.M. on August 10, 1951, on a section of track near Lettsworth, Louisiana, leased by the railroad from the Texas and Pacific Railroad. He was at the time of his death riding on the Extra 51-A, a troop train carrying Marines from Camp LaJeune, N. C. to San Diego, California, pursuant to outstanding instructions that trainmasters were to ride all troop trains unless more important duties prevented them from doing so. Both of the trains were owned and operated by the defendant, and it was stipulated that the Extra 51-A should have taken a siding to clear the Southern Belle, which was a passenger train operating on schedule time.

The plaintiff's theory of liability is that the railroad failed to exercise reasonable care in operating its trains and in furnishing the deceased with a safe place in which to work. Specifically, she alleged that the negligence of the operating crew of the Extra 51-A in failing to take the siding at Batchelor, Louisiana caused her husband's death. Although the complaint alleged that the conductor was primarily responsible in failing to direct the engineer to take this siding, it also alleged that when the engineer failed to stop at the prescribed point, the fireman and the brakeman, as well as the conductor and the engineer, were negligent in not taking immediate action to stop the train. The railroad's defense is that the deceased, as trainmaster, had the supervisory duty to see that all operating and other rules were complied with by the train crew. It sought to prove below that the failure of the Extra 51-A to take the siding or stop immediately thereafter was ultimately chargeable solely to Moore. The issue was submitted to a jury, which returned a verdict in the plaintiff's favor

The railroad specifies that the trial court erred in fail-

ing to grant it a directed verdict because there was "overwhelming" evidence that the collision resulted from the trainmaster's failing in his responsibility to require the crew to take the siding at Batchelor; in refusing to charge the jury that it must return a verdict for the defendant if it found that the trainmaster had the duty of requiring the crew to comply with rules under which the Extra 51-A should have taken the siding at Batchelor, and had breached that duty, or if it found that when the Extra 51-A passed the siding at Batchelor, Moore had a duty to require the crew to stop the train immediately and had breached that duty; and in refusing to grant a new trial in which it could be made clear to the jury that Moore's duty to enforce the rules was separate from the crew's duty to comply with them.

There is a serious issue whether the railroad saved the second of these questions for appeal.[1] However, since it goes to the central issue in the case, i.e., whether the trainmaster had the duty of supervising the train crew in its operation of the Extra 51-A, we may consider it under the general rule which allows an appellate court to notice plain errors, although they were not properly excepted to below. *U. S. v. Sellers* (5 Cir.), 75 F. 2d 623.

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[1] The specification alleges error in the refusal of a requested instruction. However, the court left the request out of its proposed charge, copies of which it gave to opposing counsel on the day before the case went to the jury. At a conference held on the following morning in the judge's chambers, the railroad's counsel made no objection to the omission of its requested instruction from the proposed charge. The judge stated at that time that "your proposed charges, as written, will appear in the record on appeal, to be compared with the charge as I give it to the Jury, and you will be allowed an exception to any change that I may make in the charge as given." This statement could not, of course, nullify the effect of the provision in Rule 51, Federal Rules of Civil Procedure: "No party shall assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." After the jury was instructed, the railroad's counsel raised no objection regarding this issue.

Regarding the motion for a directed verdict, it is clear that it was correctly denied unless reasonable men could not differ regarding the inferences to be drawn from the evidence. *Banks v. Associated Indemnity Corp.* (5 Cir.), 161 F. 2d 305. The parties stipulated that the Uniform Code of Operating Rules governed the operation and movement of the two trains over the track in question. Rule S-90 thereof provides that if the engineer of a train passes the last station before a meeting or waiting point without signalling that his rights are restricted at that station, "or fails to prepare to stop short of the fouling point, when required, the conductor will take immediate action to stop the train." It likewise provides, "Firemen, brakemen and other members of the crew will also be held responsible for failure to take immediate action to stop the train."

Admitting that in the first instance the responsibility for taking the siding or stopping immediately thereafter lay with the operating crew, the railroad sought to show that once the crew failed in these duties, the responsibility devolved upon Moore to halt the train immediately. To this end, it introduced in evidence a book of the railroad's Transportation Rules, under which conductors, brakemen and enginemen are required to "report to and receive instructions from the trainmaster" It also elicited testimony from its expert witness, the railroad's Superintendent of Transportation, to the effect that when the engineer and the conductor together ignored giving the proper signal at the last station before Batchelor, it became the trainmaster's duty to give the signal himself, or order the engineer to do it, or order the engineer to stop the train immediately. The witness explained that the failure of the crew to act left the train in an emergency which should have been noted and acted upon by the trainmaster.

In rebuttal, the plaintiff's expert witness, a former division superintendent on the railroad, exonerated the trainmaster from all responsibility for the accident. He testified that the duty of operating a train is solely that of the train crew, that it is not one of the trainmaster's duties to know of meeting points, and specifically, that it was not Moore's duty to know of the waiting point at Batchelor. He testified that the purpose of requiring trainmasters to ride troop trains is to make the train comfortable for the troops and to see that it is properly supplied. In riding thereon, the witness testified, the trainmaster "is principally goodwill ambassador for the railroad."

In support of its own theory, the railroad introduced evidence to show that Moore had in fact taken over the task of directing the train crew in their operation of the Extra 51-A. Thus, it was shown that Moore by radio ordered the No. 9, a passenger train, to wait for the Extra 51-A at Baton Rouge, about 35 miles south of the collision point, and that the No. 9 complied with his order. Its witnesses also testified that Moore was in the cab of the Extra 51-A when it went through Baton Rouge and that when it passed through Lettsworth, 1.59 miles south of the collision point, three figures were observed in the cab.

Clearly, this evidence did not warrant taking the case from the jury. In the first place, the nature of the trainmaster's duties aboard a troop train was the subject of irreconcilably conflicting expert testimony, not finally resolvable by reference to any of the published rules introduced at the trial. It may be conceded that the term "trainmaster" would ordinarily import a position of authority, but no such meaning can be attributed to it in the absence of evidence either of affirmative instructions or

standing orders or rules specifically outlining the duties of such a functionary. In the second place, the fact that Moore ordered the No. 9 halted at Baton Rouge, and was seen in the cab at that station, and perhaps at Lettsworth, also, does not compel the inference that he had "replaced the engineer," as the railroad contends. It is a matter of speculation whether he ordered the No. 9 held at the engineer's request or at his own instance, as well as what he was doing in the cab, if indeed he was there at the time of the collision. The likelihood of the conclusions which the railroad seeks to draw from this evidence is clearly a matter which was correctly reserved for the jury's consideration. *Banks v. Associated Indemnity Corp., supra; Mutual Life Insurance Co. v. Bell,* (5 Cir.), 143 F. 2d 726.

The second and third specifications of error are concerned with a common issue. The second assigns error in the rejection of a requested instruction, and the third charges error in the denial of a motion for new trial in which the instruction would be given as requested. The railroad contends that it had a right to an instruction explaining its "theory of the case" to the jury. It asserts that its defense is that "Moore had the separate, distinct and sole responsibility to see that crew members operating the train complied with all operating rules."

The court charged that

> "It [the railroad] affirmatively alleges that the collision between the two trains was due solely and proximately to the negligence of Mr. Moore, plaintiff's deceased husband, in failing to perform his responsibilities and duties to see that the operating rules and special rules and instructions in the movement of troop trains were com-

> plied with, such duties being his responsibility and only his responsibility, it being contended that their performance was the reason that Mr. Moore was instructed to ride this train and that his duties and responsibilities could not be delegated by him to other members of the crew."

The crucial error in the charge as given, the railroad argues, is its regarding the trainmaster as one of the train crew instead of superior to and apart from them. However, the use of the phrase "other members of the crew," while probably an inaccuracy, can hardly be said in itself to constitute a refusal to charge the railroad's theory of defense. The first part of the sentence emphasizes the railroad's argument that Moore was on the train to see that operating rules were complied with, and since the train crew was charged with observing the rules, the placing of the trainmaster on board to enforce them clearly shows the distinction between supervisor and worker. Of greater importance, however, practically speaking, is the fact that the jury had heard testimony for two days relating to the responsibilities of all six of the railroad's employees on the Extra 51-A, and especially the trainmaster, and could hardly have been thrown into confusion at the last moment regarding their respective duties by the trial court's use of a single technically inacurate phrase.

Apart from this, the railroad's only objection to the charge is that it was long and confusing. It is true that the charge was quite long—covering twenty-six pages in the record—but it was a model of clarity.[2] The contention

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[2] The railroad states in its brief: "In pursuing this argument we disclaim any intention to criticize the trial judge's integrity and ability. He is simply part of a system which seems to require the writing of an encyclopedic treatise and submission of it to the jury, rather than charge on specific issues and legal principles separately and distinctly stated without confusion."

that the charge was confusing is supported by reference to the use of the phrase "other members of the crew," discussed above, and to the fact that the railroad's allegation that Moore's negligence was the sole proximate cause of the accident was discussed along with the comparative negligence rule. We think that it was quite proper for the court to compare these two principles with each other, for if they were kept apart, the jury might not have been able to reconcile them in its own thinking. It is noteworthy also that the instruction regarding proximate cause—that if Moore's negligence was the sole proximate cause of the accident, the jury must find for the railroad—appears at two other places in the charge, in the instructions relating to damages, and in the discussion of respondeat superior. Regarding the charge on proximate cause of the latter context, the railroad states, "Unencumbered by 25 additional pages of instructions, that would compensate slightly, but it falls far short of giving a specific instruction on defendant's theory of the case." Thus the railroad returns again to its first argument, on which we need not elaborate further, and finally argues that the charge was confusing largely because it was long, a point which we cannot concede. To the contrary, the charge, although long, was certainly clear, and the contentions of the parties were fairly stated therein. We can find no error either in the instructions or in the submission of the case to the jury.

We conclude, therefore, that the judgment must be affirmed.

AFFIRMED.

A True Copy:
Teste:

JOHN A. FREEMAN, JR., Clerk

By /s/ CLARA R. JAMES
Deputy

Clerk of the United States Court of Appeals for the Fifth Circuit.

(SEAL)

No. 867

APR 16 1956

HAROLD B. WILLEY, Cl

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,747

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Appellant,

versus

MRS. IRENE BOOTH MOORE,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

PETITION OF LOUISIANA & ARKANSAS RAILWAY COMPANY, APPELLANT, FOR A REHEARING AND BRIEF IN SUPPORT THEREOF.

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U. S. COURT OF APPEALS
FILED
FEB 20 1956

John A. Fechan, Jr.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,747

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Appellant,

versus

MRS. IRENE BOOTH MOORE,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

PETITION OF LOUISIANA & ARKANSAS RAILWAY COMPANY, APPELLANT, FOR A REHEARING.

Comes Louisiana & Arkansas Railway Company, Appellant, through undersigned counsel, and shows the Court that a rehearing should be granted herein and assigns the following grounds therefore, viz:

1. The Court (p. 7 opinion) states that the use by the trial Court in the charge of the phrase "other members of the crew" was probably an inaccuracy but could **hardly** (emphasis ours) be said in itself to constitute a refusal to charge Appellant's theory of the case, and (on p. 8) that the jury **could hardly** (emphasis ours) be thrown into confusion at the last moment by the use of

a single technically inaccurate phrase; this deprives defendant of something to which it is entitled, viz: A complete and correct instruction on its theory of its defense.

2. The Court (p. 8) approves the trial Court's commingling of the issue of sole proximate cause with the alternative issue of contributory negligence.

3. The Court denies defendant-appellant the right to a specific, clear and unconfused instruction on its theory of the case.

4. The Court approves the denial to defendant-appellant of a new trial in order that such an instruction could be given to the jury.

WHEREFORE it prays that a rehearing herein be granted.

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Of Counsel

CERTIFICATE OF GOOD FAITH

Alexandria, Louisiana
February ....., 1956

I hereby certify that this petition for a rehearing is presented in good faith and not for delay.

.....
T. W. HOLLOMAN

CERTIFICATE OF SERVICE

Alexandria, Louisiana
February ....., 1956

I hereby certify that a copy of this petition has this day been mailed to Messrs. Booth, Lockard, Jack & Pleasant, 204 Johnson Building, Shreveport 23, Louisiana, Attorneys for Appellee.

.....
T. W. HOLLOMAN

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,747

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Appellant,

versus

MRS. IRENE BOOTH MOORE,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

BRIEF OF LOUISIANA & ARKANSAS RAILWAY COMPANY, APPELLANT, ON ITS PETITION FOR A REHEARING.

May It Please the Court:

Paragraph 27 of defendant's answer (R. 26) sets up its defense. We quote: "Defendant alleges that the collision between the two trains referred to in the complaint was due solely to the negligence of Benjamin T. Moore, plaintiff's deceased, in failing to perform his responsibilities and duties to see that the operating rules and special rules and instructions in the movement of train Extra 51-A North were complied with. Such duties were his responsibility and only his responsibility. To perform them was the reason that Trainmaster Moore was in-

structed to ride this train. These duties and responsibilities **could be delegated by him to members of the crew."** (emhpasis ours).

The portion of the charge complained of is at that point in the context of the charge where the jury was given the first strong impression of defendant's defense. After several pages devoted to the contentions of plaintiff, the Court (R. 435, 436) has a paragraph and a sentence on what defendant denies, and then proceeds (R. 436) as follows: "It affirmatively alleges that the collision between the two trains was due solely and proximately to the negligence of Mr. Moore, plaintiff's deceased husband, in failing to perform his responsibilities and duties to see that the operating rules and special rules and instructions in the movement of troop trains were complied with, such duties being his responsibility and only his responsibility, it being contended that their performance was the reason that Mr. Moore was nstructed to ride this train and that his duties and responsibilities **could not be delegated by him to OTHER members of the crew."** (emphasis ours)

We do not have here any "technically inaccurate" (brief p. 8) phrase. It is defendant's chief and outstanding defense and the Court's statement is made to the jury at the outset of a discussion of defendant's contention and position. **"OTHER members of the crew"** (emphasis ours) instead of "members of the crew" tells the jury by the strongest statement of the Court that Moore was a member of the crew or leaves that conclusion unavoidable.

Who can measure the effect of this statement on the jury? Who can count the stars?

The plaintiff had spent hours laying the blame on the crew with great pages of black letter emphasis (such as were exhibited in Court room at the argument). Defendant had also shown that the first duty to stop the train was in the crew.

It had pleaded and its counsel had argued that Moore had a separate duty that could not be delegated, and now the jury is told by the Court that defendant's position is that he could not delegate it to any other member of the crew.

Nobody can paint the impression on the minds of jurors. It won't do to say that "hardly" could a juror think this or that. It is impossible to say that the verdict may not be due to this error. Error is error. We do not understand that a litigant's rights are to be based on what Courts think that a jury could "hardly" be influenced by. Particularly when the error is at the heart of the case.

> "All the perfumes of Arabia will not sweeten this little hand."

Either by a directed verdict or a new trial defendant was and is entitled to trial by a jury to which could be given a complete and correct instruction as to what the defense is.

The rule appears to be undisputed that as against a mere general or abstract charge a party is entitled to a specific instruction on his theory of the case. Defendant here was denied that right by the refusal of its requested instruction No. IV, either in its tendered form or in a restatement of its material substance.

The Courts state that the right given by Rule 51 of the Federal Rules of Civil Procedure to request instructions is a valuable right.

We have covered this by excerpts and citations at pp. 30-31 of our original Brief to which we respectfully refer the Court. For convenience we list here a few pertinent cases.

C. & N. W. Ry. Co. v. Green, 164 F. 2d 55, 61

Montgomery v. Virginia Stage Lines, 191 F. 2d 770, 772

C. R. I. & P. R. R. Co. v. Lint, 217 F. 2d 279, 285

Paramount Film Distributing Corp. v. Applebaum, 217 F. 2d 101, 123 (5th Cir.)

Northern Central Coal Co. v. Hughes, 224 F. 2d 57, 59

The Court (p. 8 opinion) approves the comparison of the sole proximate defense with the contributory negligence rule. Our objection was to this paragraph. (R. 442)

> "If you determine that Mr. Moore's death was wholly or in part due to the negligence of the railroad's other agents or employees, the defendant may be held liable for damages in such amount as you may find would be due the plaintiff, even though there was more than one cause. Of course, in this connection, you should keep in mind, if you find them applicable, the rules regarding contributory negligence which we will give you later in this charge."

This, we feel, was prejudicial in referring to recovery by plaintiff even should there be more than one cause of the accident, and in the same breath, to contributory

negligence. Contributory negligence was pleaded in the alternative, which is not mentioned.

These things are different and not to be compared under the defense that was raised.

We respectfully submit that a rehearing should be granted for the reasons set forth in our petition for rehearing.

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CERTIFICATE OF SERVICE

Alexandria, Louisiana
February _____, 1956

I hereby certify that a copy of this brief has this day been mailed to Messrs. Booth, Lockard, Jack & Pleasant, 204 Johnson Building, Shreveport 23, Louisiana, Attorneys for Appellee.

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